

**ENFORCEMENT BUREAU EXHIBITS**

**(Numbers 26 – 34)**

**In the Matter of**

**Peninsula Communications, Inc.  
(EB Dkt. 02-21)**



EB 26

319

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Peninsula Communications, Inc.

Appellant,

v.

Federal Communications Commission

Appellee.

Case No. 00-1879

EMERGENCY MOTION FOR STAY

Peninsula Communications, Inc. (hereafter "Peninsula" or "Petitioner"), by its attorney and pursuant to Circuit Rule 18 of the Federal Rules of Appellate Procedure, hereby respectfully requests that the United States Court of Appeals for the District of Columbia Circuit stay the effect of the Memorandum Opinion And Order, FCC 00-45 (hereafter the "MO&O-II") released February 14, 2000, of the Federal Communications Commission (hereafter the "FCC" or "Commission") which was issued following reconsideration of the FCC's action in Peninsula Communications, Inc., 13 FCC Rcd 23992 (1998) (hereafter the "MO&O-I") (jointly referred to as the "Orders"), and enjoin the Commission from taking any further action pursuant to the Orders until the final resolution of the appeal pending before the Court. In support of this Motion, Petitioner respectfully submits the following.

I. Initial Motion Before the FCC

On February 23, 2000, Petitioner filed a Motion For Stay before the Commission requesting the issuance of an order staying the effect of the Orders pending the filing and resolution of the appeal in this Court. As of this date, the Commission has taken no action on the Motion For Stay. In correspondence from the FCC's staff to Petitioner subsequent to

1

Federal Communications Commission

Docket No. 02-21 Exhibit No. EB#26

Presented by EB

Disposition	{	Identified	<u>9/24/02</u>
		Received	<u>9/24/02</u>
		Rejected	

Reporter E Thomas

Date 9/24/02

the release of the MO&O-II and the submission of the Motion For Stay, the Petitioner was reminded:

As you know, the filing of a motion to stay does not itself serve to stay the obligation of a party to comply with a Commission order. In the event that the Commission fails to respond to the motion to stay, you will be required to comply fully with the requirements of the order by the operative dates given in the order, and the staff will give full effect to the order. See Exhibit 3 hereto.

This would seem to imply that the Commission is not likely to act on the Motion For Stay by the "operative dates given in the order", March 15, 2000 and April 15, 2000.

Moreover, on March 15, 1999, Petitioner filed a Motion For Stay asking the Commission to stay the effect of the MO&O-I until it considered and acted upon various petitions for reconsideration that were filed by Petitioner and others. The Commission took no action on this petition until February 14, 2000 and summarily dismissed Petitioner's request for stay at that time in connection with the release of the MO&O-II.

Accordingly, Petitioner believes that action by the Commission on its pending Motion For Stay is unlikely, and would in any event be unavailing. The MO&O-II orders Petitioner to take certain actions by March 15, 2000, or suffer irreparable injury through the immediate and unconditional revocation of the authorizations pursuant to which the Petitioner operates certain broadcast stations. Thus, Petitioner is filing the subject Motion seven (7) days in advance of the March 15, 2000 deadline in conformity with the Court's practice for such motions.

## II. BACKGROUND.

Peninsula is the FCC licensee of commercial broadcast stations KGTL(AM) and KWVV-FM, Homer, Alaska, and KPEN-FM, Soldotna, Alaska. In addition, Peninsula is the FCC licensee of eleven (11) FM translator stations located in small communities throughout the State of Alaska.

An FM translator is an automated, low power FM broadcast station that receives the signal of another FM station, converts that signal to a different FM frequency, increases the amplitude of the signal, and rebroadcasts the modified signal over a limited area to the general public. The Commission has a separate set of rules and policies governing the licensing of FM translators from those for conventional FM broadcast stations. The FM translator rules and policies include certain restrictions on their licensing and operation by the licensees of the stations that are rebroadcast thereon.

Since 1983, Peninsula has been issued licenses by the FCC to operate nine (9) of its current FM translator stations in a manner that is inconsistent with certain provisions of the FM translator rules. These licenses were approved and issued by the FCC pursuant to waivers of the applicable FM translator rules under a policy known as the "Alaska Exception" (hereafter the Alaska Exception Translator Licenses or "AETL"). The Alaska Exception was first articulated in the Commission's decision in Wrangell Radio Group, 75 FCC 2d 404 (1979). Under the Alaska Exception policy, the FCC liberally waives the provisions of its rules governing FM translator licensing for stations operated within the State of Alaska due to the distinct lack of communications service in that state, and in order to encourage the implementation of new broadcast services. The translator licenses issued by the FCC for Peninsula's subject translators pursuant to the Alaska Exception did not contain any conditions under which the waivers could be withdrawn by the Commission at a later date and pursuant to which Peninsula could be required to divest the stations or face the termination of the licenses.

In 1995, FM translator licensees in Alaska, including Peninsula, routinely filed applications with the FCC seeking the renewal of their licenses. The nine Peninsula license renewal applications for the Alaska Exception Translators were the subject of petitions by several radio broadcasters in Alaska (hereafter the "Alaska Broadcasters") seeking the denial

thereof and the termination of the licenses. The Alaska Broadcasters argued that a 1990 FCC Report And Order, 5 FCC Rcd 7212 (1990) had modified the FM translator rules to such an extent that the Alaska Exception FM translator rule waivers were no longer valid, and the Report And Order required Peninsula to bring the operation of its translators into conformity with the new rules by the end of 1994. Peninsula maintained that its waivers remained valid under its operating licenses and the express language in the Report And Order, that it had never been notified by the Commission of any modification in the licenses, that its continued operation of the FM translators was appropriate, and that its license renewal applications should be approved for the full 8 year term provided for in the Commission's Rules.

In the 1996 Letter, the FCC's staff, under delegated authority, granted the Alaska Broadcasters petitions in part, deferred the processing of the 1995 Peninsula FM translator license renewal applications, and ordered Peninsula to divest the licenses and to file applications to assign the licenses to one or more unaffiliated parties. The 1996 Letter expressly represented that in the event the assignment applications were approved the license renewal applications would also be approved conditioned only upon the consummation of the assignments. Peninsula filed applications to assign the licenses to an unaffiliated entity, Coastal Broadcast Communications, Inc., and the Alaska Petitioners filed petitions in opposition to the sale.

In the 1997 Letter, the FCC's staff, under delegated authority, approved the assignment applications for the sale of the AETL translators to Coastal and the 1995 AETL license renewal applications, but conditioned the latter approvals upon the consummation of the sale *and* upon an additional condition: the grant of AETL license renewal applications that Peninsula had routinely filed earlier in 1997 in accordance with the FCC's rules. Various petitions seeking review of the 1997 Letter were filed with the Commission.

The Commission thereupon reviewed the two staff letters and the record in the proceeding. Its MO&O-I found there was no evidence that Peninsula had attempted to deceive or mislead the Commission in its operation of the nine Alaska Exception Translators, that Peninsula's belief that its Alaska Exception waivers entitled it to continue to operate the stations beyond 1994 was "reasonable," and that there was no "substantial and material question of fact raised in the subject renewal proceeding regarding Peninsula's basic character." Nevertheless, the FCC approved the 1997 license renewal applications for these FM translators conditionally, and affirmed the earlier actions by the its staff requiring the divestiture of the licenses, conditionally approving the assignment applications to Coastal, and conditionally approving the 1995 license renewal applications. The Commission also notified Peninsula and Coastal that it was reserving the right for the future "...termination of the [two] Seward translator operations..." upon the start of operation by a new FM station that had been authorized to operate at Seward. The Commission also denied the Alaska Exception waiver requests for the two Kodiak FM translators and dismissed the underlying applications to modify the licenses to allow for the satellite reception of their FM feeds.

In January of 1999, Peninsula and the Alaska Broadcasters submitted requests to the Commission for reconsideration of the MO&O-I. Peninsula sought reconsideration of the Commission's action denying the Kodiak FM translator applications as inconsistent with FCC legal precedent and its past policy and actions on similar Alaska Exception applications by other applicants. Peninsula sought reconsideration of the conditional approval of the 1997 license renewal and assignment applications based on (a) the additional condition in the MO&O-1 of the future termination of the operation of the two Seward FM translators prior to the end of their normal license terms as inconsistent with actions the Commission had taken in approving licenses for other translators in Alaska under similar circumstances, and (b) contrary to the public interest due to the significant listenership of the two



translators in that community . Peninsula also sought reconsideration of the conditional nature of the Commission's license renewal approvals for the 1995 and 1997 applications for its stations based on the FCC's specific finding in the MO&O-I that Peninsula's actions in operating the nine Alaska Exception Translators after 1994 was "reasonable" and did not reflect adversely on its character and integrity as a licensee, and the Commission's resulting lack of statutory authority under the Section 309 Communications Act of 1934, as amended in 1996, to approve broadcast license renewal applications on a conditional basis in light of such a finding. At the same time, Peninsula filed a request for a stay of the divestiture requirements in the MO&M-I pending Commission action on the petitions for reconsideration.

In the MO&O-II released on February 14, 2000, over a year after Peninsula filed its requests for reconsideration and a stay, the Commission summarily dismissed the Peninsula petition for reconsideration, along with a supplement and an associated pleading, on a procedural basis without discussing the merits thereof. The two Seward FM translators were ordered to terminate their operation under the Alaska Exception waivers within 60 days from the release date of the MO&O-II. The MO&O-II dismissed Peninsula's request for stay of the requirements of the MO&O-I. The FCC's staff was ordered to rescind the 1995 and 1997 license renewal grants for the nine Alaska Exception Translators, to cancel their call signs, and to terminate their operating authority in the event the assignment of the licenses to Coastal was not consummated within 30 days of the release date.

Peninsula seeks to have the Commission's actions in the MO&O-II and MO&O-I, in affirming and modifying the 1997 Letter and the 1996 Letter, reviewed by this Court on appeal for the following reasons:

1. The FCC's actions in conditionally approving Peninsula's 1995 and 1997 license renewal applications and requiring divestiture rather than granting a full eight year term were based on factual errors, were arbitrary, capricious, and not in accordance with the

Commission's statutory authority under the Sections 308 and 309 of the Communications Act of 1934, as amended; are in conflict with the Order, FCC 96-172, released April 12, 1996, implementing the broadcast license renewal procedures of Sections 204(a) and 204(c) of the Telecommunications Act of 1996; are in conflict with the provisions of 47 C.F.R. Sections 73.1012, 73.3516, 73.3591; and are otherwise not in accordance with law;

2. The FCC's actions in interpreting and applying its Rules, policies, and precedents to Peninsula's Kodiak FM translator applications are erroneous, arbitrary, capricious, based on factual errors; are inconsistent with its actions approving similar applications requesting Alaska Exception waivers by Peninsula and other FM translator licensees currently operating in the State of Alaska; and violate the Commission's obligation under *Wait Radio*, 418 F.2d 1153 (1969), to adequately explain the reasons Peninsula's waiver requests were not deemed appropriate;

3. The Commission's actions in interpreting and applying its Rules, policies and precedents in requiring the divestiture and/or termination of Peninsula's nine Alaska Exception translator licenses are erroneous, arbitrary, capricious, and contrary to the express language in the 1990 Report And Order modifying the FM translator rules which provided, *inter alia*, that the rule modifications promulgated therein would have no effect on FM translator licenses previously or subsequently approved pursuant to the Alaska Exception;

4. The Commission failed to properly consider, and failed to adequately explain the summary dismissal of, Peninsula's "Petition For Reconsideration" of the MO&OI and the materials submitted in connection therewith under the mandate and standards of 47 C.F.R. Section 1.106 and such action on a petition based on new information clearly supporting Peninsula's continued operation of the translators under the Alaska Exception and in the public interest, was erroneous, arbitrary, capricious and contrary to the public interest requirement of the Communications Act of 1934, as amended, and the Commission's Rules and policies;

5. The Commission has not properly supported or articulated an appropriate underlying basis and public interest justification or need for its actions (a) requiring the immediate divestiture of Peninsula's FM translator licenses within 30 days of the release date of the MO&O-II, or (b) ordering the termination of the service provided by the Alaska Exception translators through the immediate revocation of their licenses in the event the divestiture is not consummated within that time period; or (c) for the termination of the operation of the two Seward FM translators' operations under the Alaska Exception waiver contained in their licenses, with the resulting termination of the service provided thereby, within 60 days from that date; and such actions exceed the statutory authority of the Commission under the Communications Act of 1934, as amended, and the laws and statutes under which the FCC receives its regulatory prerogative;

6. The Commission's actions in modifying its AETL in connection with the Report And Order, and subsequently notifying Peninsula that it was required to divest the licenses for its Alaska Exception translators in connection with the 1995 license renewal applications, effectively modified the station licenses without giving Peninsula the opportunity to show cause why the licenses should not be modified, or to pursue its other legal rights and remedies in that regard and without giving Peninsula adequate notice to protest such modifications, in violation of Section 316 of the Communications Act of 1934, as amended,

and the other Rules, regulations, laws and policies pursuant to which the Commission regulates broadcast stations and draws its regulatory authority over such broadcast licenses.

7. The Commission's actions in withdrawing the Alaska Exception Translator waivers, thereby terminating Peninsula's ability to receive the programming sources that it has chosen to broadcast to the public, violate Peninsula's First Amendment rights under the Constitution to free speech, including commercial free speech, and in the selection and broadcast of the programming of its choice.

### III. LEGAL STANDARD FOR GRANTING A STAY

The Court's current standard for determining whether to grant motions for a stay of its orders pending judicial review is found in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977). Holiday Tours affirmed the "four-prong test" which a stay proponent must satisfy as originally established in Virginia Petroleum Jobbers Association v. F.C.C., 259 F. 2d 921 (D.C. Cir. 1958). These are (1) that the petitioner is likely to prevail on the merits of its appeal; (2) that the petitioner will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay. However, Holiday Tours modified the Petroleum Jobbers standard by instructing that greater weight should be placed on prongs (2), (3) and (4). If these three factors favor the grant of the stay, the relief should be granted even though the proponent cannot demonstrate that it is likely to prevail on appeal, but where it can show a substantial basis for the prosecution of its appeal.

#### A. IRREPARABLE HARM TO PETITIONER

The termination on March 15, 2000 of the licenses pursuant to which Petitioner operates its translators will result in the permanent loss of the use thereof by Petitioner without any recourse to regain these unique authorizations. Moreover, in the event that

Petitioner conveys the licenses to Coastal, Petitioner will have no ability to reclaim the use of the licenses should the Court should find that the Commission's action requiring the divestiture of the licenses was erroneous or otherwise not in accordance with law.

However, the consummation of the sale of the licenses to Coastal is not an option open to Peninsula at this time. In a "Supplement To Motion To Stay", filed with the Commission on March 3, 2000, Peninsula disclosed that Coastal notified Peninsula in writing on March 2, 2000 that it is unwilling to consummate the purchase of the station licenses and assets pursuant to the contract between the two parties due to (a) the conditional nature of the Commission's action in approving the sale; (b) the questions raised by the Commission's actions on the continued viability of the licenses; and (c) the 3 1/2 years it has taken for the Commission to process and finally act on the matter. See Exhibit 4 hereto.

Coastal is willing to consider a re-negotiation of the terms under which it might purchase the Peninsula licenses and assets. However, it is not able and/or willing to do so under the compulsion of the Commission's arbitrary March 15, 2000 deadline for the termination of the licenses.

Thus, unless the Court stays the effect of the Commission's Order, Peninsula will permanently lose the licenses for the Alaska FM translators on March 15, 2000, and be irreparably injured.

#### B. THE PUBLIC INTEREST.

The Peninsula FM translators have provided the residents of small communities in Alaska with needed broadcast services and information. As noted previously, the basis for the Alaska Exception to the FM translator Rules is the need for additional broadcast service in the State of Alaska. The Commission's proposed termination of the Peninsula FM translator authorizations is contrary to the public interest in that it will end the services that

these nine translators provide in the State of Alaska and that are needed by the residents of the state.

This need is real. Following the release of the Commission's MO&O-II on February 14, 2000, and the subsequent media attention the matter has received in Seward, Alaska over the pending loss of its two FM translators under the FCC's MO&O-II even in the event the licenses are assigned to Coastal, the residents have flooded Peninsula's offices with letters expressing the public interest benefits that result from the operation of the Peninsula facilities, and their outrage that a governmental agency is terminating those services. Copies of letters, newspaper articles and electronic mail messages received by Peninsula as of March 3, 2000 were filed with the Commission on that date, and are appended hereto as Exhibit 5.

Peninsula filed radio listener ratings information with the Commission in March of 1999 that showed the Peninsula FM translator stations in Kodiak were rated among the most popular in that town, and that the Seward translator were the most popular stations in that community. See Exhibit 6. The popularity of the Peninsula translators in its other communities of license is comparable. Thus, the public interest is in the continuation of the operation of the Peninsula translators, not in the discontinuation of the service they provide to the residents of the various towns and communities.

#### C. HARM TO OTHERS.

The Commission's action in requiring that Peninsula divest its licenses for the FM translators has not been based on harm to any specific persons or group. Rather, the action is based on enforcing technical compliance with the Commission's FM translator Rules. As noted, Peninsula has operated certain of these FM translators since 1983 without causing any apparent harm or damage to anyone prior to the 1995 filing of the Alaska Stations petitions. Thus, there is no reason to believe that maintaining the status quo and allowing the stations

to continue to operate will cause harm to anyone. The licenses for these stations have been routinely renewed over the years.

There is one exception. The MO&O-II indicates at paragraph 9 that "...KPFN claims that Peninsula's Seward translators are taking between \$4,000 and \$6,000 per month in radio revenues out of Seward..." and therefore that station is being damaged through the loss of these revenues. Peninsula has never been asked to supply information on the revenues it realizes from its operation of the Seward translators. This amount is well less than the above figure. Moreover, it is sheer speculation on the Commission's part that KPFN, or anyone else, would be able to realize this additional revenue in the event the Seward translators cease operation. No harm has been shown to result from the operation of the Peninsula translators.

#### D. THE MERITS OF PENINSULA'S APPEAL.

As shown, the Commission has presented a moving target to Peninsula in connection with the requirements and conditions that have been made as preconditions for renewing the licenses for the stations. Peninsula's attempts to comply with the Commission's dictates have only resulted in additional conditions being arbitrarily created and thrown in the path of Peninsula's efforts to continue to provide needed broadcast services to the people of Alaska. Such arbitrary and capricious conduct by a Federal regulatory agency has often been the basis for relief in the Court.

As noted, the FCC's action in modifying the licenses for the Peninsula translators without prior notice violates a number of provisions of the Communications Act. Its action in conditionally approving the AETL renewal applications following findings that (a) Peninsula was not deceitful or dishonest in its dealings with the Commission; (b) had "reasonably" operated the FM translators under the AETL after 1994; and (c) had otherwise operated the stations in the public interest, violated the express procedures the Commission

adopted in 1996 for the processing of broadcast license renewal applications in its  
Implementation of Section 204((a) and 204 (c) of the Telecommunications Act of 1996, FCC  
96-172 (released April 12, 1996) See Exhibit 7.

Based on these considerations, and those in the Notice of Appeal, Peninsula deserves relief from the Court in connection with its appeal, and will likely be granted relief from the arbitrary, capricious and legally reprehensible manner in which it has been rewarded for its years of service to the public in Alaska.

Accordingly, Peninsula respectfully requests that the Court grant the relief requested herein.

A copy of the MO&O-1 and MO&O-2 are appended as Exhibit 1 and Exhibit 2, respectively.

Respectfully submitted

Peninsula Communications, Inc.

By: 

Jeffrey D. Southmayd

Southmayd & Miller  
1220 Nineteenth Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 331-4100

Date: March 9, 2000

## DECLARATION OF DAVID BECKER

I, David Becker, President of Peninsula Communications, Inc. ("PCI"), do hereby swear and affirm under penalty of perjury that I have reviewed the attached Emergency Motion For Stay and that the facts contained therein are true and correct to the best of my personal knowledge and belief.

Date: March 8, 2000

---

David Becker